SUPREME COURT, U. S.

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MICHAEL RODAK, JR.,

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-1098

MIKE ABBAS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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TOPICAL INDEX

	Page
TABLE OF AUTHORITIES----------	ii
OPINION BELOW----------	1
JURISDICTION----------	2
QUESTIONS PRESENTED----------	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED----------	3
STATEMENT OF THE CASE----------	4
REASONS FOR GRANTING THE WRIT------	9
CONCLUSION----------	24

APPENDIX A

OPINION OF THE COURT OF APPEALS

APPENDIX B

ORDER DENYING PETITION FOR REHEARING BY COURT OF APPEALS

APPENDIX C

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

TABLE OF AUTHORITIES

Case	Page
Allen v. United States, 164 U.S. 492, 17 S.Ct. 154 (1896)	7
Butzman v. United States, 205 F.2d 343 (6th Cir. 1953)	10
Chapman v. California, 386 U.S. 18, 87 S.Ct. 824 (1967)	22
Cool v. United States, 409 U.S. 100, 93 S.Ct. 354 (1972)	17, 18
Driscoll v. United States, 376 F.2d 254 (1st Cir. 1967)	10
Edwards v. United States, 375 F.2d 862 (9th Cir. 1967)	10, 11
Gaunt v. United States, 184 F.2d 284 (1st Cir. 1950)	11
Glasser v. United States, 315 U.S. 60, 62 S.Ct. 457 (1942)	22, 23
Hendrick v. United States, 357 F.2d 121 (10th Cir. 1966)	10
Holland v. United States, 348 U.S. 121, 75 S.Ct. 127 (1954)	20

Case	Page
Hull v. United States, 324 F.2d 817 (5th Cir. 1963)	10, 11
In re Winship, 397 U.S. 358, 90 S.Ct. 1068 (1970)	18
Irvin v. Dowd, 366 U.S. 717, 81 S.Ct. 1639 (1969)	17
Lloyd v. United States, 226 F.2d 9 (5th Cir. 1955)	21
McNabb v. United States, 318 U.S. 332, 63 S.Ct. 608 (1943)	20
Poonian v. United States, 294 F.2d 74 (9th Cir. 1961)	13
Sheppard v. Maxwell, 384 U.S. 333, 86 S.Ct. 1507 (1966)	17
State v. Randall, 137 Mont. 534, 353 P.2d 1054 (1960)	16
State v. Thomas, 86 Ariz. 161, 342 P.2d 197 (1959)	16
Thompson v. City of Louisville, 362 U.S. 199, 80 S.Ct. 624 (1960)	23

Case	Page
United States v. Bishop, 412 U.S. 346, 93 S.Ct. 2008 (1973)	14, 15
United States v. Brown, 411 F.2d 930 (7th Cir. 1969)	16, 19
United States v. Fioravanti, 412 F.2d 407 (3rd Cir. 1969)	16, 19
United States v. Hawk, 497 F.2d 365 (9th Cir. 1974)	14, 15
United States v. Johnson, 432 F.2d 626 (D.C. Cir. 1970)	19
United States v. Thomas, 449 F.2d 1177 (D.C. Cir. 1971)	16
United States v. Warner, 428 F.2d 730 (8th Cir. 1970)	10

UNITED STATES CONSTITUTION

Fifth Amendment	3
Sixth Amendment	3

STATUTES

26 U.S.C. §3793(b)(1)	9, 11

	Page
26 U.S.C. §7201	12
26 U.S.C. §7206(2)	2, 3, 4, 9, 10 11, 12, 13
26 U.S.C. §7207	12
28 U.S.C. §1254(1)	2

TEXTS

American Bar Association Standards Relating to Trial By Jury (1968)	16

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PETITION FOR A WRIT OF CERTIORARI
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Petitioner, MIKE ABBAS, prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on October 4, 1974.

OPINION BELOW

The opinion of the court below is not yet reported, and appears as Appendix "A" herein. No written opinion was rendered by the United States District Court for the Central District of California.

JURISDICTION

The judgment and opinion of the court below was entered on October 4, 1974, affirming Petitioner's conviction in the United States District Court for the Central District of California for three violations of 26 U.S.C. §7206(2). A timely Petition for Rehearing was denied on February 3, 1975. A copy of the order denying rehearing appears as Appendix "B" herein. This Petition for Writ of Certiorari is being filed within 30 days of denial of the Petition for Rehearing. The Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether Petitioner's conviction without proof that the allegedly false items in the returns were material to the computation of correct tax liability deprived him of due process of law?

2. Whether failure of the trial court to define "wilfully" to mean "with bad motive or evil intent," and on the issue of wilfullness to require the jury to consider Petitioner's good faith belief in the truthfulness of the reports made by him deprived him of a fair trial and due process of law.

3. Whether consideration by the jury of Government-prepared charts which omitted information, contained data contrary to the evidence, and consisted of conclusions of a Government agent deprived Petitioner of a fair trial and due process of law?

4. Whether coercion of a jury verdict by use of the "Allen" instruction deprived Petitioner of a fair trial and due process of law?

5. Whether Petitioner's conviction without proof that he aided in the preparation of the allegedly false returns deprived him of due process of law?

6. Whether the admission into evidence of hearsay documents was so prejudicial that it deprived Petitioner of a fair trial and due process of law?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved are the relevant portions of the Fifth and Sixth Amendments to the United States Constitution and 26 U.S.C. §7206(2), all of which appear as Appendix "C" herein.

STATEMENT OF THE CASE

Petitioner, an employee of M. B. Corporation, was indicted under 26 U.S.C. §7206(2) in connection with nine individuals who had come to the corporation for the preparation of their income tax returns. He was tried by a jury, which returned verdicts of guilty with respect to Count Six concerning Lucy Vinluan, and Counts Eleven and Twelve concerning Leigh and Kimiko Emerson, Jr. The jury acquitted him of two counts and were unable to reach agreement as to the remaining counts, which were dismissed.

The evidence was, essentially, that when a customer came to the corporation for the preparation of a tax return, he would be given a worksheet to take home and fill out. When the information had been supplied, the customer was interviewed by a preparer. When the customer had no receipt to substantiate his claim, the preparer took his word for his recollection or estimate of a claimed deduction. The preparer then turned the papers over to other company personnel for checking and reviewing. The customer was requested to return a week later to pick up the

completed return, to check it and to make any necessary changes.

When the customer came back to obtain his completed return, he would meet with the preparer, if available, or with someone else if the preparer were not available. It was company practice to have any available person make corrections on the return. The schedule of deductions often contained the handwriting of several individuals.

Unless further changes were necessary, when a customer came for this return he would obtain the original and a copy of the cover page (unless more were requested) from company personnel other than the preparer, and would pay a fee of from $30 to $50. He would be told to sign and mail the original of the return to the Internal Revenue Service.

With respect to the counts of the indictment resulting in Petitioner's conviction, there was ample evidence that standard procedures, permitting a number of people to work on the returns, had been followed. There was no evidence that the returns were in Petitioner's handwriting or that he was the only one who worked on them.

The Government made no effort to show that the allegedly false or fraudulent deductions were material to a determination of correct net taxable income and tax liability. In fact, the Government successfully prevented Petitioner from showing that in several cases the taxpayers were entitled to additional unclaimed deductions which would have affected the materiality of the allegedly false or fraudulent deductions.

The Government was permitted to rest its case solely on the assertion that certain deductions were incorrect and that it was Petitioner, and not the taxpayers, who had created the error. With respect to the Emersons, the Government was permitted to do this, over objection and a motion to strike, by introducing into evidence returns originally filed by the taxpayers which had been prepared by a firm of CPA's. They differed from the amended returns for the same years subsequently prepared for the Emersons by M. B. Corporation. However, it was not shown that the original returns correctly reflected the Emersons' tax liability and that the amended returns did not.

The Government was permitted to place

in evidence, over objection, 2' X 3' cardboard charts prepared by a special agent of the Internal Revenue Service, which purported to be a recapitulation of the evidence. The charts were not a summary of the evidence. They evaluated testimony, omitted certain items, changed others, and characterized some by placing them in a column entitled, "Told to Abbas," despite the fact that, for example, taxpayer Emerson testified at one time that he told Petitioner practically nothing.

Defense proffered instructions defining wilfullness in terms of bad faith or evil intent were rejected, as were defense proffered instructions requiring the jury to consider the Defendant's good faith belief in the truthfulness of the reports he had prepared. The cause thus went to the jury with the issue of wilfullness virtually undefined.

On the third day of deliberations, the jurors sent a note to the court stating that they were deadlocked as to all the counts. Over defense objection, the trial court then gave an "Allen" (Allen v. United States, 164 U.S. 492, 17 S.Ct. 154 [1896]) instruction. Eventually the jury returned

the guilty verdicts here involved.

Petitioner was sentenced to three years in custody. All but the first 90 days of the sentence were suspended and Petitioner was placed on probation for a period of three years. He was also ordered to pay a fine of $500 and, among other things, to refrain from preparing tax returns for anyone unrelated to him.

On appeal Petitioner's conviction was affirmed. Although the court below was critical of "the admission of the charts as exhibits and their presence during jury deliberation" (Appendix "A", page 4), it held that the error was not prejudicially harmful to Petitioner. It erroneously stated that there were "no errors in the charts coupled to the counts upon which Abbas was convicted." (Appendix "A", page 4). In fact, there were errors in all the charts, including those relating to the counts upon which Petitioner was convicted. The court brushed aside Petitioner's other major contentions and gave no consideration whatsoever to his argument that both on constitutional and supervisory grounds, it should have condemned the "Allen" instruction.

REASONS FOR GRANTING THE WRIT

1. The court below construed 26 U.S.C. §7206(2) so as to render the word "material" a virtual nullity. It held that a conviction under that section could be sustained without regard to the materiality of the allegedly false report to tax liability. This Court has never decided whether such a construction of the statute is valid and comports with the Congressional intent. The question is a significant and recurring one.

Prior to the enactment of the 1954 Internal Revenue Code §7206(2), was substantially embodied in §3793(b)(1). The earlier section was significantly different from §7206(2) in one respect. It made punishable any false statement without regard to its materiality:

> "(b). Fraudulent Returns, Affidavits and Claims -
>
> (1). Assistance in Preparation or Presentation -
> Any person who wilfully aids or assists in...the preparation... of a false or fraudulent return, affidavit, claim or document shall...be guilty of a felony...."

The latter section [§3793(b)(1) of the 1939

Code] was interpreted in Butzman v. United States, 205 F.2d 343 (6th Cir. 1953) to make punishable one who wilfully aided in the preparation of any document containing a false statement, without regard to its materiality to correct tax liability. Without analyzing the importance of the change made in the law by the addition of the word "material," the court below rejected Petitioner's contention that §7206(2) now reached only those who aided in the preparation of false documents which affected actual tax liability.

Since the revision of the Code in 1954, a number of cases involving liability pursuant to §7206(2) of tax preparers have been before courts of appeals. See, e.g., United States v. Warner, 428 F.2d 730 (8th Cir. 1970); Driscoll v. United States, 376 F.2d 254 (1st Cir. 1967); Edwards v. United States, 375 F.2d 862 (9th Cir. 1967); Hendrick v. United States, 357 F.2d 121 (10th Cir. 1966); Hull v. United States, 324 F.2d 817 (5th Cir. 1963). In none of those cases did the court consider or decide what effect the addition of the word "material" had upon liability under that section. And none considered or decided what "material," as used in §7206(2), means.

Hull, the only case in which the court to some extent discussed the question of materiality, made no mention of the difference between §3793(b)(1) and §7206(2), and relied upon a pre-1954 case, Gaunt v. United States, 184 F.2d 284 (1st Cir. 1950) for its conclusion.

Generally, in discussing a §7206(2) conviction, courts have merely reiterated the statutory requirement of materiality without explicating further. Even so, in virtually every case there has been clear and convincing proof that the false matter was material to correct tax liability. Petitioner's case is fairly unique, as in it there was no proof that the supposedly false reports were material to net tax liability; there was no instruction making such proof a prerequisite to conviction; the Government took the position that materiality to actual tax liability was irrelevant; and the Court of Appeals rejected Petitioner's argument that to support a conviction under §7206(2) the items alleged to be false must be material to the computation of the correct tax liability, citing Edwards v. United States, supra, in which there was clear proof of precisely

that sort of materiality.

While Congress shed little light on its reason for adding the materiality requirement to §7206(2), it is logical to assume that it did so in order to make it an essential element of the offense. The statutory scheme commencing with 26 U.S.C. §7201 makes tax liability the critical question in each section. It follows that Congress intended that the materiality requirement of §7206(2) must relate to the computation of correct tax liability.

Further support for this proposition is found when 26 U.S.C. §7207 is considered along with §7206(2). The former section penalizes one who wilfully furnishes, delivers or discloses tax-related information known to be false "as to any material matter." Although the section uses the word "material" just as does §7206(2), the former is a misdemeanor, whereas the latter is a felony. It would be irrational to presume that Congress intended the mere preparer to be punished more severely than the knowing, wilful "principal." Yet, if the requirement of materiality as used in §7206(2) is construed as not requiring a connection with correct tax liability, that would be the anomalous result. It follows

that Congress intended the preparer, the one who assisted in the making of a false report, to be punished more severely only for the more serious offense of providing false information which affects correct tax liability. Cf., Poonian v. United States, 294 F.2d 74 (9th Cir. 1961). This Court should so hold, in this case.

2. The decision below, in effect, removed the element of bad faith or evil motive from the conduct prohibited by 26 U.S.C. §7206(2) by approving improper instructions. The trial court had rejected two of Petitioner's proposed instructions. One would have defined "wilfully" in terms of acts committed in bad faith or with evil motive, and without justification. The other would have required the jury to consider, on the issue of "wilfulness," Petitioner's good faith belief in the truthfulness of the reports prepared by him. Instead of giving Petitioner's instructions, the trial court, over objection, gave a standard definition of "wilfulness" from Devitt & Blackmar, which contained neither the concept of bad faith or evil motive, nor of the defendant's good faith belief in the lawfullness of his conduct.

On appeal, Petitioner contended that the trial court improperly instructed the jury on wilfulness, pointing out that in United States v. Bishop, 412 U.S. 346, 93 S.Ct. 2008 (1973), this Court defined "wilfully" as used in the group of statutes of which the one here involved is a part, in terms of bad purpose or evil motive. The court rejected Petitioner's argument, relying upon an earlier decision of the Ninth Circuit, United States v. Hawk, 497 F.2d 365 (9th Cir. 1974).

In Hawk, the court said that Mr. Justice Blackmun's reference to "evil motive," made in the Bishop case, was merely a statement "that wilfulness is to be uniformly defined to require the bad purpose or evil motive described in Murdock v. United States, 290 U.S. 389, 78 L.Ed. 381 (1933)." 497 F.2d at 368. The court there said that "wilfully" did not need to be defined to the jury by use of the words "bad purpose or evil motive." It was sufficient, according to that court, if the totality of instructions encompassed both the notion that "wilfulness" imported bad purpose and lack of a good faith belief in the lawfullness of the conduct in question. Assuming, arguendo, that the court

in Hawk properly construed the Bishop decision, the court in the instant case took a giant step away from this Court's decision on "wilfulness."

The question here is whether an instruction on "wilfulness" in a tax case is sufficient when it uses neither the precise language of Bishop nor any simple explanation that wilfulness requires proof that the act alleged was committed with knowledge that it was wrongful and without a good faith belief on the part of the defendant that it was proper under the law. Such instructions were lacking in the instant case. The instruction actually given merely required a finding that Petitioner's conduct was with a bad purpose. It in no way told the jury that it was not enough if the "bad purpose" was simply one which resulted in his preparing a statement on an income tax return, which statement subsequently proved to be false. It in no way told the jury that the bad purpose had to negate his honest belief that the statements were proper ones for him to prepare.

It was the latter kind of "wilfulness" which the Bishop case said was required.

If that case is to be given full effect, instructions defining that element of the offense accurately must be required. Without them a defendant, such as Petitioner, is convicted by a jury which no matter how much it wants to, cannot follow the law because it does not know what the law is.

3. The decision below tacitly approved the giving of an Allen instruction at a time when, after two and a half days of deliberation, the jury reported itself hopelessly deadlocked as to all counts. The silent approval of the Allen instuction is in direct conflict with an ever-widening circle of courts which has expressed disapproval of that instruction. See, United States v. Thomas, 449 F.2d 1177 (D.C. Cir. 1971); United States v. Fioravanti, 412 F.2d 407 (3rd Cir. 1969); United States v. Brown, 411 F.2d 930 (7th Cir. 1969); State v. Thomas, 86 Ariz. 161, 342 P.2d 197 (1959); State v. Randall, 137 Mont. 534, 353 P.2d 1054 (1960). See also, American Bar Association Standards Relating to Trial By Jury, 145-146 (1968). This Court, both for constitutional reasons, and in the exercise of its supervisory power, should condemn the Allen instruction.

The constitutional principles appear to be well-established, but their application to the Allen instruction remain largely undetermined. A jury is supposed only to consider relevant and admissible evidence. This Court has said that if, in arriving at a verdict, jurors may have been influenced by extraneous matter, the defendant has been deprived of a fair trial. Cf., Sheppard v. Maxwell, 384 U.S. 333, 86 S.Ct. 1507 (1966); Irvin v. Dowd, 366 U.S. 717, 81 S.Ct. 1639 (1969). The Allen instruction violates this constitutional principle. It tells the jury to consider not merely the evidence, but the fact that a trial is costly to both sides and that it's failure to agree may require a retrial. It places emphasis upon the mental, emotional and financial strain of a trial in an effort to convince the jury to reach a verdict. These considerations, otherwise inadmissible before a jury, render the giving of the instruction constitutionally infirm.

It is the duty of the prosecution to establish, by duly admitted evidence, a defendant's guilt beyond a reasonable doubt. Cool v. United States, 409 U.S.

100, 93 S.Ct. 354 (1972); In re Winship, 397 U.S. 358, 90 S.Ct. 1068 (1970). In the Cool case, this Court said that an instruction which undermines the reasonable doubt standard deprives a defendant of a fair trial and due process of law. The Allen instruction asks jurors who oppose conviction to consider whether their doubt is a reasonable one, in view of the fact that so many of their fellows have examined the same evidence and decided that there is no reasonable doubt. It also implies the defendant's guilt by pointing to his being placed twice in jeopardy.

The very concept of reasonable doubt must allow each juror the freedom to decide for himself. Furthermore, the requirement of a unanimous verdict in a criminal case indicates that there can be no finding of guilt beyond a reasonable doubt if one juror is undecided. And, a retrial does not automatically follow mistrial caused by a hung jury, for the weakness of the Government's case may cause a dismissal of the charges. It follows that requiring dissenting jurors to question whether their doubt is a reasonable one,

coupled with the implication that it is not, calls upon those jurors to lower their standards and decide the case on something less than the reasonable doubt standard. An instruction which permits a conviction on less than reasonable doubt is constitutionally impermissible. As the Allen instruction does this, it violates the Constitution.

The continued use of the Allen instruction is contrary to the fair administration of justice. A number of courts have condemned the instruction in their supervisory capacities. Notably, they have criticized and decided to eliminate those portions of the instruction here questioned on a constitutional basis. For example, in United States v. Johnson, 432 F.2d 626 (D.C. Cir. 1970), the Court examined the Allen charge critically and suggested the elimination of the "majority-minority" element of the instruction. See also, United States v. Fioravanti, supra. And in United States v. Brown, supra, the court in barring the use of the Allen instruction, was particularly critical of the coercive effect of the admonition of the jury that there would have to be a retrial, with its attendant inconvenience

to the parties. In addition, all of the courts which have eliminated the instruction have recognized that its infirmities, whether constitutional or not, have been a source of endless litigation. Hence, those courts have done what this Court in its supervisory capacity (McNabb v. United States, 318 U.S. 332, 63 S.Ct. 608 [1943]) should do in the instant case: prohibit the use of the Allen charge.

4. A number of other significant problems are raised by the decision below. Among them are the following:

(a). Is it prejudicial error to receive in evidence and allow the jury to consider during their deliberations, charts prepared by the Government which purport to summarize all testimony of the witnesses? In its decision, the court was highly critical of the introduction of these charts in evidence. It acknowledged the warning given by this Court in Holland v. United States, 348 U.S. 121, 75 S.Ct. 127 (1954) that the trial court should "be wary of situations in which figures, computations, and charts acquire 'an existence of their own, independent of the evidence which gave rise to them.'" (Appendix "A", p. 2). The court quoted

at length from Lloyd v. United States, 226 F.2d 9 (5th Cir. 1955), which criticized the use of charts containing conclusionary captions of precisely the sort used in Petitioner's case. The decision below recognized that such charts are not evidence, but when used throughout the jury's deliberations, act not only as evidence, but as isolated pieces of evidence likely to be given undue significance.

Despite its own recognition that permitting the charts to go to the jury was error, the court below concluded that the error was not prejudicial. It did so, in part, in the mistaken belief that Petitioner was not convicted on any counts in which the charts incorrectly reflected the evidence. Actually there was at least one error relating to a count of which Petitioner was convicted. Furthermore, this was an extremely close case. The nexus between Petitioner and the purportedly false returns was tenuous at best. After two and a half days of deliberation, the jury was still in disagreement and had to be coerced by an "Allen" charge. The particular error complained of was a very serious one, as the court noted.

Even if the error was not of constitutional dimensions and therefore did not require application of the standard enunciated in Chapman v. California, 386 U.S. 18, 87 S.Ct. 824 (1967), it should have been considered in light of the admonition given by this Court in Glasser v. United States, 315 U.S. 60, 67, 62 S.Ct. 457 (1942):

> "[E]rror which under some circumstances would not be ground for reversal, cannot be brushed aside as immaterial since there is a real chance that it might have provided the slight impetus which swung the scales toward guilt."

(b). Did the admission of hearsay evidence so prejudice Petitioner as to deprive him of a fair trial? The trial court allowed into evidence the first 1968 and 1969 tax returns filed by the Emersons. They had been prepared by a firm of Certified Public Accountants. Petitioner had nothing to do with them and the taxpayers did not testify that the original returns correctly reflected their allowable deductions. Hence, their only

impact could have been to prejudice the jury into thinking that a firm of CPA's must have been right and truthful, and Petitioner must have been wrong and dishonest. Once again, the admonition of this Court in the Glasser case, that errors in the admission of such evidence most likely are, in a close case, prejudicial to a defendant, should have been heeded.

(c). Can a conviction be sustained without proof that the defendant was the person who committed the prohibited acts? In Thompson v. City of Louisville, 362 U.S. 199, 80 S.Ct. 624 (1960), this Court said that a conviction without evidence is a deprivation of due process of law. The question here is whether a conviction in which the only evidence is circumstantial, and which evidence does not show, beyond a reasonable doubt, a nexus between the defendant and the criminal conduct, can stand. The evidence was that several people processed returns for the M. B. Corporation before they were delivered to the taxpayers. None of the evidence established that Petitioner's handwriting was on the

allegedly fraudulent returns. In fact, some of the returns plainly showed evidence of handwriting by three or more individuals. As there was no clear link between the prohibited conduct and Petitioner, his conviction was not sustained by evidence and amounted to a deprivation of due process of law.

CONCLUSION

For the foregoing reasons a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

MARTHA GOLDIN and
ALAN SALTZMAN

By MARTHA GOLDIN

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Appellee,* vs. MIKE ABBAS, *Appellant.*	No. 73-3234 OPINION

[October 4, 1974]

Appeal from the United States District Court for the Central District of California

Before: BARNES and HUFSTEDLER, Circuit Judges, and ENRIGHT, District Judge*

ENRIGHT, District Judge:

On March 19, 1973, a twelve count indictment was returned against the defendant by the federal grand jury for the Central District of California.

The indictment charged the defendant in each count with violations of 26 U.S.C. § 7206(2), in that he had willfully assisted in the preparation of false federal income tax returns.

On September 4, 1973, a jury found the defendant guilty as to counts six, eleven, and twelve involving the tax returns of Lucy Vinluan and Leigh and Kimbo Emerson. The defendant was found not guilty as to counts four and five, and the jury could not agree as to the remaining counts which were subsequently dismissed.

The basic issue in this case concerns the government's preparation and use, as evidence, of a number of allegedly demonstrative

*The Honorable William B. Enright, United States District Judge for the Southern District of California, sitting by designation.

charts, summarizing the testimony of the witnesses as to the variation between the sums of money which the witnesses reported to the tax preparer and the amount actually listed on the returns by the preparer. The defense asserts that it was improper to have permitted the jury to receive into evidence what it contends were argumentative and conclusional materials.

The government relies in part upon *United States v. Bartone*, 400 F.2d 459 (6th Cir. 1968), *cert. denied*, 393 U.S. 1027 (1969) for the proposition that use of such charts has been approved. But even in circumstances where the use of charts is not improper, *Bartone* held that "it is necessary that the trial judge carefully examine this type of evidence and supporting exhibits, out of hearing of the jury, in order to determine that everything contained in the summary is supported by the proof." *Id.* at 461. This was not done and would appear to be the better practice, although the defendant was given ample opportunity over a weekend to examine the charts and thereafter to pursue his specific objections to the court.

But this is not to say that the use of charts is always permitted. *Holland v. United States*, 348 U.S. 121, 75 S. Ct. 127 (1954)—albeit a case involving a complicated net worth, tax evasion situation[1]—admonished trial courts to be wary of situations in which figures, computations, and charts acquire "an existence of their own, independent of the evidence which gave rise to them." *Id.* at 128, 75 S. Ct. at 131.

Lloyd v. United States, 226 F.2d 9 (5th Cir. 1955) amplifies upon *Holland*. A lengthy citation would not be without some benefit:

> The use of this type evidence, however, has inherent dangers to an accused, for a jury is often unfairly and unduly impressed by the apparent authenticity of a government witness' chart computations, as such, rather than by the truth and accuracy of the underlying facts and figures supporting

[1]The government has attempted to distinguish the instant case from *Holland* arguing that whereas the latter is a complicated, net worth, tax evasion case, the former involves simpler false return circumstances. But this contention is a double-edged sword, for where the jury is less pressed to remember precise figures and make mathematical calculations, the use of charts may be less desirable.

them. A trial court is charged with grave responsibilities in such instance to insure that an accused is not unjustly convicted in a "trial by charts," however impressive the array produced. Ordinarily, it would be the better practice, not so carefully observed in this instance, to require that the source of the facts and figures upon which such a chart is based be fully disclosed before its admission into evidence. Whenever possible, such charts should be confined in their preparation to strictly mathematical computations, subject to detailed explanation upon the trial by the testimony of expert government witnesses, and they should not be encumbered by such impressive, conclusionary captions as "Overstatement of Merchandise Purchases", "Overstatement of Delivery Expenses", "Unreported Cash Receipts of Lloyd's Bakery", "Unreported and Undeposited Cash Receipts Invested in United States Savings Bonds", "Unreported Net Income of Mr. E. C. Lloyd", "Income Tax Unreported and Unpaid by Mr. Lloyd", such as were used on the Government charts here in dispute. While a prosecution witness may testify as to such conclusions from his mathematical computations, we think the danger in permitting the unrestricted use of such phrases upon charts results from a jury's natural tendency to accept such unsworn, conclusionary verbiage as authentic, primary proof, instead of purely in summarization and explanation of sworn testimony or authenticated documentary evidence.

In general principle, we agree with this reasoning. We would conclude that it would have been better practice for the trial court to have allowed the charts to be marked for identification and used by the foundation witness as a testimonial aid, or, since they purported to represent summarized testimony, to be utilized by counsel in argument as a visual summary of complex facts. In either event, the charts should not have gone to the jury for use during their deliberations. The dangers are apparent. A signed or handwritten statement of a defendant presents an apt analogy. It would be considered physical evidence and admitted as an exhibit; an unsigned typewritten statement of such defendant in itself is hearsay. It may be read to the jury under certain circumstances; the conversation it represents may be repeated by precipient witnesses; but the unsigned typewritten statement itself

would not be received as evidence. The danger inherent in such evidence is that it would act as a speaking, continuous witness throughout the jury's deliberation of certain specific, isolated—albeit significant—testimony to the exclusion of the totality of the evidence taken at the trial which must be viewed in its entirety.

But if the admission of the charts as exhibits and their presence during jury deliberation was error, we must next weigh whether such error was prejudicial and requires reversal. Our review of the entire record, especially including the counts upon which the defendant was acquitted, convinces us that the error was not prejudicial. In respect to the charts, the trial judge gave the defense an opportunity to cross-examine the witness who testified relative to the charts, to indicate any purported errors in the charts, and to present any similar appropriate demonstrative aids as part of the defense case. In addition, the court indicated he would give a limiting instruction and then thereafter did instruct the jury that the exhibits had been admitted as an *explanation* of other evidence while the charts were *not proof* per se; the jury was further instructed that the summaries were presented merely as a *matter of convenience* and "to the extent that you [the jury] find they are not in truth summaries of facts or figures shown by the evidence in the case you are to disregard them entirely." The defendant neither objected to the instruction as given nor requested any additional language pertaining to the limiting instruction. Viewed in such perspective, we would hold that the admission of the charts did not prejudicially harm the defendant in the instant circumstances. At oral argument, defense counsel indicated various purported errors on several of the charts. The jury, however, did not convict the defendant of any counts associated with those charts. Counsel noted no errors in the charts coupled to the counts upon which Abbas was convicted.

Brief comment may be made on those other issues worthy of mention.

Defense argues that the items alleged to be false must be material to the computation of the correct tax liability to support a conviction of 26 U.S.C. § 7206(2). *Edwards v. United States*, 375 F.2d 862, 865 (9th Cir. 1967) belies this contention.

The defendant also asserts that there was insufficient evidence to prove that he was the one that aided and assisted in preparation. He reasons that since several persons within his office would have helped the taxpayers, there was too weak a nexus to him individually. Upon reviewing the transcript, we are satisfied that the evidence was sufficient. *Cf. United States v. McKee*, 456 F.2d 1049 (6th Cir. 1972), *cert. denied*, 407 U.S. 910 (1972); *United States v. Cramer*, 447 F.2d 210 (2d Cir. 1971), *cert. denied*, 404 U.S. 1024 (1972); *United States v. Barnes*, 313 F.2d 325 (6th Cir. 1963).

The defendant also contends that the trial court improperly instructed the jury in defining "wilfully." He relies upon *United States v. Bishop*, 412 U.S. 346, 360, 93 S. Ct. 2008, 2017 (1973). A review of *Bishop* and the precedent upon which it is based, leads us to conclude that defendant's reliance is misplaced. Courts

> have rejected claims that willfulness instructions must include the terms bad purpose or evil motive. . . .
>
> . . . While the use of such terms is often helpful, all that is required are instructions which communicate the proper notion of specific intent in understandable terms. . . .

United States v. Hawk, 497 F.2d 365, 368-69 (9th Cir. 1974). As in *Hawk*, the instructions here were adequate for that purpose.

Finally, we may address the defendant's suggestion that the trial court improperly interjected himself by rehabilitating a government witness. In his cross-examination of the witness, defense counsel pressed the witness, attempting to demonstrate her bias because of the failure of a romance between the defendant and herself. Under the stress of the cross-examination, the witness lost her composure. At this point, the court interposed and questioned the witness to assure the jury and himself that her answers reflected truth and not prejudice. The trial court's interruption of cross-examination is always a matter of great delicacy, particularly in a jury trial. Due to the considerable discretion permitted to the trial judge in such matters, we cannot say the court abused its discretion in his inquiry.

Affirmed.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO 10-16-74—400

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
FEB 3 1975
U. S. COURT OF APPEALS
RECEIVED
FEB 4 1975

UNITED STATES OF AMERICA,

Appellee,

v.

MIKE ABBAS,

Appellant.

No. 73-3234

ORDER

Before: BARNES and HUFSTEDLER, Circuit Judges and ENRIGHT, District Judge.*

The panel as constituted in the above case has voted to deny the petition for rehearing, and to reject the suggestion for a rehearing en banc.

The full Court has been advised of the suggestion for an en banc hearing, and no judge of the Court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

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*The Honorable William B. Enright, United States District Judge for the Southern District of California, sitting by designation.

APPENDIX "B"

APPENDIX "C"

Fifth Amendment:

"No person shall...be deprived of life, liberty, or property, without due process of law...."

Sixth Amendment:

"In all criminal proceedings, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed... to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

26 U.S.C. §7206(2):

"(2) Aid or assistance - Wilfully aids or assists in, or procures, counsels, or advises the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a return, affidavit, claim, or other document, which is fraudulent or is false as to any material matter, whether or not such falsity or fraud is with the

knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document;..."

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1098

MIKE ABBAS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Central District of California, petitioner was found guilty on three counts of a 12-count indictment charging that he had willfully aided and assisted in the preparation of income tax returns which were false as to material matters, in violation of 26 U.S.C. 7206(2). He was sentenced to a term of three years' imprisonment, all but 90 days of which was suspended, placed on probation for three years, and fined a total of $500. The court of appeals affirmed (Pet. App. A).

The pertinent facts are as follows: Petitioner prepared the 1970 income tax return for a Miss Vinluan in which she claimed $848 of deductions for expenses that she had not in fact incurred (Tr. 224, 227-238).[1] The deductions consisted of alleged payments to doctors and dentists

[1] "Tr." designates the transcript of proceedings at the trial.

($152); medical insurance ($146); dues, subscriptions and books ($65); and various other false deductions (Tr. 227-238). Petitioner prepared this return after he had discussed the items of income and expense with Miss Vinluan for about an hour (Tr. 224-225). She did not know where he got the deduction figures that he put on the return, but he advised her that these were just "little amounts, and the IRS would not bother to look at them" (Tr. 239).

The other two counts on which petitioner was convicted involved amended returns for the years 1968 and 1969 for a Mr. and Mrs. Emerson. Mr. Emerson presented to petitioner copies of his original 1968 and 1969 returns, which had been prepared by a firm of certified public accountants (Tr. 405-407). Petitioner looked at them, said "This is ridiculous" and stated that they could be amended (Tr. 407). He then prepared false amended returns for those years (Tr. 408-409), claiming $250 for drugs, medicines and vitamins instead of the correct figure of $125 shown on the original return (Tr. 412, 414); $350 of gasoline taxes rather than the correct figure of $105 shown on the original return (Tr. 414-415); $130 of contributions to churches instead of the correct figure of $30 (Tr. 415-416); and various other inflated deduction figures. These false deductions totalled $664 for 1968 (Tr. 412-418). Petitioner followed the same procedure for the year 1969, claiming $250 of drugs and medicines instead of the correct figure of $60 shown on the original return (Tr. 420); $440 of real estate taxes rather than the correct figure of $370 (Tr. 423); and various other inflated deduction figures, which totalled $785 (Tr. 420-427).

These amended returns of the Emersons, like Miss Vinluan's original return, were filed with the Internal Revenue Service. Emerson paid petitioner a fee of $40 for preparing each of the false amended returns (Tr. 408). During the Treasury agents' investigation, petitioner phoned Mr. Emerson on a number of occasions and urged

him not to answer any of the agents' questions until he had contacted petitioner (Tr. 465) and not to show them any documents (Tr. 466). He also sent Emerson a magazine article which set forth the penalties for knowingly filing a false return (Tr. 466-467).

1. Petitioner argues (Pet. 9-13) that he was deprived of due process of law because there was no proof that the false items in the tax returns were material to the computation of correct tax liability. However, it is apparent that the amount of deductions claimed on a return has a direct bearing on the computation of tax liability. At all events, it is well settled that the government is not required to prove the existence of tax deficiencies in a prosecution under Section 7206(2) for aiding in the preparation of false tax returns. See, *e.g.*, *Edwards* v. *United States*, 375 F.2d 862, 865 (C.A. 9); *Hull* v. *United States*, 324 F.2d 817, 823 (C.A. 5).

2. Petitioner further contends (Pet. 13-16) that the trial court's instructions to the jury on the issue of willfulness were incorrect and contrary to *United States* v. *Bishop*, 412 U.S. 346. The instructions on willfulness were as follows (Tr. 714, 715):

> The crime charged in this case is a serious crime which requires proof of specific intent before the defendant can be convicted. Specific intent, as the term implies, means more than the general intent to commit the act. To establish specific intent the government must prove that the defendant knowingly did an act which the law forbids, purposely intending to violate the law. Such intent may be determined from all the facts and circumstances surrounding the case.

> An act or failure to act is knowingly done, i[f] done voluntarily and intentionally, and not because of mistake or accident or other innocent reason.
>
> * * * * *
>
> An act is done willfully if done voluntarily and intentionally, and with the specific intent to do something the law forbids; that is to say, with bad purpose either to disobey or to disregard the law.

Contrary to petitioner's argument, these instructions were in full compliance with the Court's decision in *Bishop*. It was unnecessary for the jury to be instructed that petitioner was not guilty if he had a good faith belief in the truthfulness of the returns since that point was encompassed in the trial court's instruction with respect to knowledge and purpose. See *United States* v. *Hawk*, 497 F.2d 365, 368-369 (C.A. 9), certiorari denied, October 15, 1974, No. 73-1873.

3. Petitioner also argues (Pet. 16-20) that the trial court erred in giving an "*Allen* charge" to the jury. This charge (Tr. 732-736) instructed the jurors to attempt to reconcile their differences and to agree upon a verdict if they could conscientiously do so.

The charge given to the deadlocked jury closely paralleled the instruction approved by this Court in *Allen* v. *United States*, 164 U.S. 492, 501. Although it was decided nearly 80 years ago, this Court quoted approvingly from *Allen* three terms ago in *Johnson* v. *Louisiana*, 406 U.S. 356, 361, stating that "a dissenting juror should consider whether his doubt was a reasonable one." See also *Lias* v. *United States*, 284 U.S. 584. The instruction made plain to the jury that no juror should merely acquiesce in the conclusion of others and that the jurors "should not surrender [their] honest convictions as to the weight or effect of evidence solely because of the opinion of other jurors, or for the mere purpose of returning a verdict" (Tr. 733).

Four courts of appeals have determined in the exercise of their supervisory power that the *Allen* charge should be modified with balancing elements. *United States* v. *Angiulo*, 485 F.2d 37 (C.A. 1); *United States* v. *Fioravanti*, 412 F.2d 407 (C.A. 3), certiorari denied *sub nom. Panaccione* v. *United States*, 396 U.S. 837; *United States* v. *Brown*, 411 F.2d 930 (C.A. 7), certiorari denied, 396 U.S. 1017; *United States* v. *Thomas*, 449 F.2d 1177 (C.A.D.C.). These courts have suggested that the charge, if given, approximate the ABA Standards.[2] "[I]n the interest of judicial economy and uniformity" the Seventh Circuit has ruled that only a particular form of supplemental instruction can be given to the jury. *United States* v. *Silvern*, 484 F.2d 879, 882-883.

Other courts of appeals have approved a more traditional *Allen*-type charge. See, *e.g.*, *United States* v. *Birrell*, 447 F.2d 1168, 1173 (C.A. 2), certiorari denied, 404 U.S. 1025;[3] *United States* v. *Bailey*, 468 F.2d 652, affirmed, 480 F.2d 518 (C.A. 5) (*en banc*); *United States* v. *Wiebold*, 507 F.2d 932 (C.A. 8).

Whatever division in the form of the instruction there may be, however, all courts of appeals agree that some form of supplemental charge can be given to a jury that has been unable to agree. The use of the *Allen*-type instruction is still being reexamined by the various circuits. However, there is no difference among the circuits con-

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[2]ABA Project on Minimum Standards for Criminal Justice, Standards Relating to Trial by Jury, Section 5.4 at 145-146 (Approved Draft, 1968).

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[3]Accord, *United States* v. *Cowles*, 503 F.2d 67 (C.A. 2), certiorari denied, January 13, 1975, No. 74-5409. The Court has recently denied certiorari in two other cases raising the *Allen*-charge issue. See *Fonseca* v. *United States*, 490 F.2d 464 (C.A. 5), certiorari denied, December 16, 1974, No. 74-5359; *Villasencia-Garcia* v. *United States*, decided November 8, 1974, No. 74-2299 (C.A. 9), certiorari denied, March 3, 1975, No. 74-5674.

cerning the constitutionality of the instruction. Such differences as remain may properly be attributed to the supervisory power possessed by each court of appeals.[4]

4. Petitioner renews the argument (Pet. 20-22) that the trial court erred in admitting in evidence certain charts summarizing the evidence. With respect to this contention, the court of appeals concluded (Pet. App. A 3-4) that while it would have been better practice not to have permitted the jury to use the charts during its deliberation, petitioner was not harmed in view of the "guarding instructions" given by the trial judge as to the use to which the charts could be put (see *Holland* v. *United States*, 348 U.S. 121, 128), and in view of the fact that none of the errors which allegedly crept into the charts had any bearing on the counts on which petitioner was convicted.

5. Finally, petitioner urges (Pet. 23-24) that there was no proof that he was the person who committed the prohibited acts. But the testimony of Miss Vinluan and Mr. Emerson fully established that petitioner prepared the returns, that all of their dealings were with him, that it was his idea to prepare false amended returns for 1968 and 1969 for Mr. and Mrs. Emerson, and that he advised Emerson during the investigation not to talk to the agents or give them any documents (Tr. 224, 408-409, 465, 466).[5]

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[4]Indeed, the Ninth Circuit itself appears to be in the process of reexamining supplemental instructions to deadlocked juries. In *United States* v. *See*, 505 F.2d 845, 854 (emphasis in original), the court wrote: "We doubt that it is really any longer advisable to give the *Allen* instruction at all, and it *certainly should be given only when it is apparent to the district judge from the jury's conduct or the length of its deliberations that it is clearly warranted.*" In *See*, the defense argued that an *Allen* instruction should have been given before the court declared a mistrial after the jury announced it was deadlocked.

[5]Petitioner's argument (Pet. 22-23) that the trial court erred in admitting Emerson's copies of original 1968 and 1969 returns rests entirely upon his misconception that Emerson "did not testify that the original returns correctly reflected their allowable deductions" (Pet. 22). However, Emerson did so testify with respect to each relevant item (Tr. 412-427).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MAY 1975.